

DJW/mat

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

KORY A. WELCH,

Plaintiff,

v.

No. 03-2132-JWL-DJW

CENTEX HOME EQUITY CO., LLC, et al.,

Defendants.

MEMORANDUM AND ORDER

Pending before the Court is Plaintiff's Request for Leave to File Answer to Centex Counterclaim Out of Time (doc. 132). For the reasons stated below, Plaintiff's Motion will be granted.

Relevant Procedural History

On November 19, 2003, Defendant Centex was granted leave to amend its Answer in order to file a counterclaim against Plaintiff. On November 21, 2003, Defendant Centex filed and served the referenced counterclaim; thus, the deadline before which Plaintiff was to file an answer or other response to the Centex counterclaim was December 11, 2003. On February 16, 2004, Plaintiff requested leave to file an answer to the counterclaim out of time. On March 18, 2004, due to the procedural posture of the case on issues unrelated to the matters before the Court, the January 31, 2004 discovery deadline was extended to June 30, 2004 and trial reset in conjunction with the new deadline.

Discussion

Plaintiff asks the Court to permit her to file an answer out of time. Plaintiff filed her request after the time for filing her answer had expired. Accordingly, under Fed. R. Civ. P. 6(b), Plaintiff must show “excusable neglect” for her failure to file an answer before the original deadline.

The United States Supreme Court discussed the meaning of “excusable neglect” in *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. Partnership*.¹ To determine whether neglect is “excusable,” the Court must take account of all relevant circumstances surrounding a party’s delay, including (1) the danger of prejudice to the other party or parties, (2) the length of the delay and its potential impact on the case, (3) the reason for the delay, including whether it was within the reasonable control of the party seeking relief, and (4) whether the movant acted in good faith.²

A. Danger of Prejudice

Defendant Centex argues it will be prejudiced if Plaintiff is permitted to file her answer to its counterclaim out of time. In support of this argument, Defendant Centex states that Plaintiff’s Motion was filed after the close of discovery and her proposed answer includes thirteen separate proposed affirmative defenses, some which are new. Defendant Centex maintains that these circumstances necessarily prevent Defendant Centex from conducting any discovery on the new issues.

¹507 U.S. 380, 395 (1993).

²*Id.* Although *Pioneer* involved an interpretation of the Bankruptcy Act, courts have applied those same standards in the Rule 6(b) context. *See, e.g., Outley v. Coca Cola Enterprises, Inc.*, No. 97-2056-GTV, 1998 WL 118070, at *1 (D. Kan. Mar.11, 1998); *Blissett v. Casey*, 969 F.Supp. 118, 123 (N.D.N.Y.1997).

Given the current procedural posture of the case – more specifically, an extension of the January 31, 2004 discovery deadline to June 30, 2004 – the Court rejects Defendant Centex’s argument, as discovery will remain open for at least two months after the proposed answer is filed.

B. Length of Delay

Viewed in the context of the activity in this case during the approximately two-month period of time between the original deadline and Plaintiff’s request for leave to file an answer out of time, the Court finds the length of the delay relatively innocuous. On November 18, 2003, Plaintiff was granted leave to file an Amended Complaint adding a party defendant. On November 24, 2003, Plaintiff filed a Motion to Stay Proceedings due to procedural difficulties in filing the Amended Complaint, due to former Defendant Jay Jordan’s recent bankruptcy filing and the automatic stay imposed as a result.

A telephone conference on this issue was held by the Court on December 9, 2003 and the parties were directed to brief the automatic stay issue as it applied to the remaining defendants. After the issue was fully briefed, the Court denied the request for stay, ordered the case to proceed against the remaining defendants and, on February 5, 2004, directed Plaintiff to file a Second Amended Complaint excluding Jay Jordan as a defendant. When a corrected Second Amended Complaint ultimately was filed, the Court deemed the applicable pretrial and trial deadlines were impracticable as the new party defendant had not yet been served. As a result, the parties were ordered to submit proposed revisions to the pretrial and trial schedule. On March 18, 2004, the Court amended the Scheduling Order extending, among other deadlines, the discovery cutoff to June 30, 2004.

Based on the procedural history during the relevant time period as described, the Court finds the length of delay between the original deadline to file an answer and the date Plaintiff requested leave to file her answer out of time should not be a controlling factor.

C. Reason for Delay/Good Faith

Counsel for Plaintiff asserts that the move of his office, a delay in connection of his internet access and the press of business contributed to his failure to timely file an answer to the counterclaim. Based on this assertion, the Court finds the delay was entirely within the control of Plaintiff's counsel. On the other hand, and as discussed *supra*, Plaintiff's delay will cause no prejudice to Defendant Centex and no material delay of the proceedings. Likewise, the Court has no reason to believe that Plaintiff or her attorney acted in bad faith. Accordingly, the Court will permit Plaintiff to file an answer to Defendant Centex's counterclaim out of time. With that said, the Court notes that inadvertence, mistake and the press of other legal matters generally does not constitute excusable neglect.³ It therefore cautions counsel that future derelictions will not be excused.

For the reasons stated above, Plaintiff's Motion is granted and she shall be permitted to electronically file an answer or otherwise respond to Defendant Centex's counterclaim if she does so by **April 30, 2004**.

³*Walls v. Int'l Paper Co.*, 192 F.R.D. 294, 296 (D. Kan.2000) (delay due to attorney's busy practice rarely constitutes excusable neglect); *see also* Kan. Sup.Ct. Rule 1.3 (lawyer shall act with reasonable diligence and promptness); *CSU, L.L.C. v. Xerox Corp.*, 202 F.R.D. 275, 282 (D.Kan.2001) (attorney inadvertence, ignorance of rules or mistakes construing rules usually not excusable neglect).

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this _____ day of October, 2004.

David J. Waxse
United States Magistrate Judge

cc: All counsel and *pro se* parties